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APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 840

IB OTTO ASTRUP, *Petitioner*

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
DEPARTMENT OF JUSTICE, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed October 12, 1970
Certiorari Granted January 18, 1971

DOCKET ENTRIES

United States Court of Appeals
For the Ninth Circuit

Excerpt from Proceedings of Monday, July 6, 1970

Before: Chambers and Trask, Circuit Judges, and Plummer, District Judge

ORDER OF SUBMISSION

This cause coming on for hearing, Paul N. Halvonik, Attorney at Law, argued for the appellant, and David R. Urdan, Assistant U. S. Attorney, argued for the appellee, thereupon the Court ordered the cause submitted for consideration and decision.

United States Court of Appeals
For the Ninth Circuit

Excerpt from proceedings of Wednesday, July 8, 1970

Before: Chambers and Trask, Circuit Judges, and Plummer, District Judge

ORDER DIRECTING FILING OF OPINION AND DISSENTING OPINION AND FILING AND RECORDING OF JUDGMENT

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

United States Court of Appeals
For the Ninth Circuit

No. 23859

Ib Otto Astrup,
Petitioner-Appellant,
vs.
Immigration & Naturalization Service,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of California

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered July 8, 1970

ORIGINAL
(To be retained by Clerk of Court)

UNITED STATES OF AMERICA

PETITION FOR NATURALIZATION

Filed under SECTION 316(a)

No. [illegible]

To the Honorable

The DISTRICT Court of THE UNITED STATES of SAN FRANCISCO, CALI

This petition for naturalization, hereby made and filed, respectfully shows:

(1) My full, true, and correct name is IB OTTO ASTRUP

(2) My present place of residence is 1960 Parkside Drive, Walnut Creek, Contra Costa, California
(Number and street) (City or town) (County) (State)

(3) My occupation is Food store manager

(4) I was born on November 23, 1926 in Odense Denmark
(Month) (Day) (Year) (City or town) (Country)

(5) My personal description is as follows: Sex Male, complexion FAIR, color of eyes Green, color of hair Dark Blonde
height 6 feet 1 inches, weight 190 pounds, visible distinctive marks None

(6) I am a citizen, subject, or national of Denmark
country of which I am a citizen, subject, or national

(7) I am married; the name of my wife (husband) is Lis-Annette, born Hesserschmidt
(or was married on June 12, 1960 at Martinez California
(Month) (Day) (Year) (City or town) (State)
at Copenhagen Valby Denmark, on April 11, 1936 and entered the United
(City or town) (County) (Country) (Month) (Day) (Year)
States at Los Angeles, California November 3, 1959 for permanent residence in the United States
(City or town) (State) (Month) (Day) (Year)
and now resides at (with me)
(Number and street) (City or town) (County) (State)
and was naturalized on (Month) (Day) (Year)
at (City or town) (County) (State), certificate No. ; or became a citizen by

(7a) (If petition is filed under section 319 (a), Immigration and Nationality Act.) I have resided in the United States in married union with my United States citizen spouse for at least 3 years immediately preceding the date of filing this petition for naturalization, and have been physically present in the United States at least half of that time.

(7b) (If petition is filed under section 319 (b), Immigration and Nationality Act.) My husband or wife is a citizen of the United States, is in the employment of the Government of the United States, or of an American institution of research recognized as such by the Attorney General of the United States, or an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or subsidiary thereof, or of a public international organization in which the United States participates by treaty or statute, or is authorized to perform the ministerial or security functions of a religious denomination having a bona fide organization within the United States, or is employed solely as a missionary by a religious denomination or by an interdenominational mission organization having a bona fide organization within the United States, and hath husband or wife is regularly stationed abroad in such employment. I intend in good faith upon naturalization to live abroad with my spouse and to reside my residence within the United States immediately upon termination of such employment abroad.

(8) I have one living children.

(9) My lawful admission for permanent residence in the United States was at New York, New York
(City or town)
under the name of IB OTTO ASTRUP on February 20, 1950
(Month) (Day) (Year)
on the S.S. "Oslo Fjord"
(Name of vessel or other means of conveyance)

(10) Since my lawful admission for permanent residence I have not been absent from the United States, for a period or periods of 6 months or longer, except as follows:

DEPARTED FROM THE UNITED STATES			RETURNED TO THE UNITED STATES		
Point	Date (Month, day, year)	Vessel or Other Means of Conveyance	Point	Date (Month, day, year)	Vessel or Other Means of Conveyance

(11) It is my intention in good faith to become a citizen of the United States and to renounce absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which at this time I am a subject or citizen. (12) It is my intention to reside permanently in the United States. (13) I am not and have not been for a period of at least 10 years immediately preceding the date of this petition a member of or affiliated with any organization proscribed by the Immigration and Nationality Act or any section, subsidiary, branch, affiliate or subdivision thereof nor have I during such period believed in, advocated, engaged in or performed any of the acts or activities prohibited by that Act. (14) I am able to read, write and speak the English language (unless exempted thereunder). (15) I am, and have been during all the periods required by law, a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. I am willing, if required by law, to bear arms on behalf of the United States, to perform noncombatant service in the Armed Forces of the United States, and to perform work of national importance under civilian direction (unless exempted thereunder). (16) I have resided continuously in the United States since Feb. 20, 1950 and continuously in the State in which this petition is made for the term
(Month) (Year)
of 6 months at least immediately preceding the date of this petition and I have been physically present in the United States for at least one-half of the 5 year period immediately preceding the date of this petition. (17) I have NOT heretofore made petition for naturalization No.
on (Month) (Day) (Year) at (City or town)
the (Number) Court, and such petition was denied by that Court for the following reasons and causes, to wit:

(18) All marked boxes and made a part of this, my petition for naturalization, are the affidavits of at least two credible witnesses required by law.
(19) Wherefore I, your petitioner for naturalization, pray that I may be admitted a citizen of the United States of America, and that my name be changed to
(NONE)

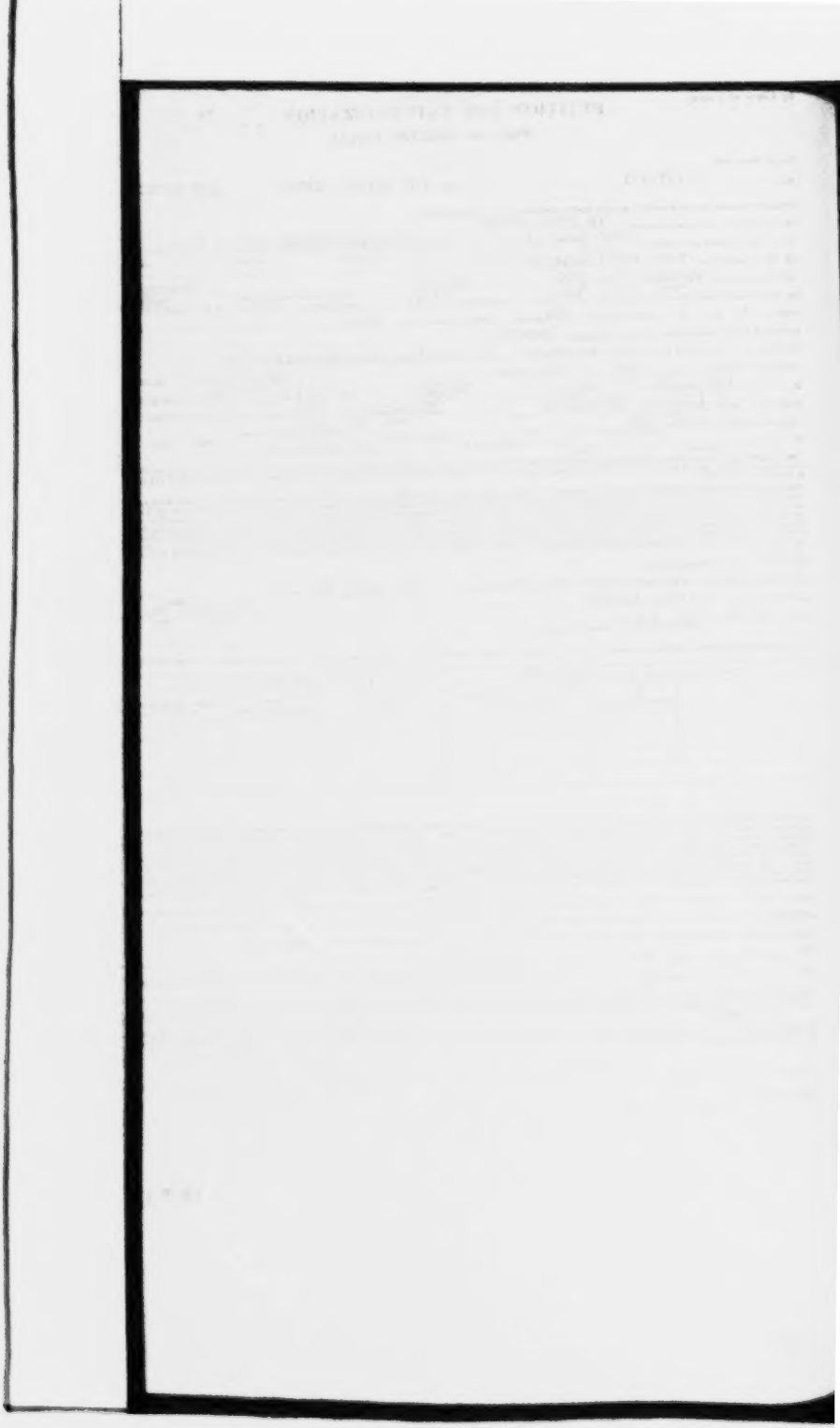
I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, and that the same are true to the best of my knowledge and belief, and that this petition is signed by me with my full, true name. SO HELP ME GOD.

ALIEN REGISTRATION NO. A-7 425 039

[signature]
(Petitioner's usual signature)
IB Otto Astrup

Form N-400
(Rev. 11-1-62) FFI LPC-10-64-1961-1003

[R.T. 1]



AFFIDAVIT OF WITNESSES

(1) My name is Jonny J. Astrup, my occupation is Housewife
I reside at 895 Daving Ave., Lafayette, California
(2) My name is Jonny M. Tallisch, my occupation is Housewife
I reside at 321 - 27th Street, San Francisco, California

I am a citizen of the United States of America; I have personally known and have been acquainted in the United States with the petitioner named in the petition for naturalization of which this affidavit is a part, since at least May 1, 1950 to my personal knowledge the petitioner has resided, continuously preceding the date of filing this petition, in the United States continuously since the date last mentioned; that the petitioner has been physically present in the United States for at least 31 months of that period; and that the petitioner has been a resident in the State in which the petitioner resided for at least 3 months. I have personal knowledge that the petitioner is, and during all such periods has been a person of good moral character, well disposed to the good order and happiness of the United States, and in my opinion the petitioner is entitled to be admitted to citizenship of the United States. I have no interest in the petitioner's petition for naturalization. I have not been convicted of any crime or misdemeanor, and have no bias or prejudice for or against the petitioner. I am not related to the petitioner nor to any of the petitioner's witnesses to this petition for naturalization. I have read the petition for naturalization subscribed by me and the statements therein contained are true to the best of my knowledge and belief. SO HELP ME GOD.

Jonny J. Astrup (Signature of witness)

Jonny M. Tallisch (Signature of witness)

WHEN OATH ADMINISTERED BY CLERK OR DEPUTY CLERK OF COURT

Subscribed and sworn to (affirmed) before me by above-named petitioner and witnesses in the respective forms of oath shown in said petition and affidavit, and filed by said petitioner, in the office of the clerk of said court at SAN FRANCISCO, CALIFORNIA this 14th day of May, A. D. 1965

JAMES P. WELSH, Clerk.
By Lucille Edwards, Deputy Clerk
For the Clerk
ju

seal

WHEN OATH ADMINISTERED BY DESIGNATED EXAMINER

Subscribed and sworn to (affirmed) before me by above-named petitioner and witnesses in the respective forms of oath shown in said petition and affidavit at ..... this ..... day of ....., A. D. 19....

.....
Designated Examiner.

I HEREBY CERTIFY That the foregoing petition for naturalization was by petitioner named therein filed in the office of the clerk of said court at ..... this ..... day of ....., A. D. 19....

.....
Clerk.

.....
Deputy Clerk.

OATH OF ALLEGIANCE

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and the laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same;

that I will bear arms on behalf of the United States when required by the law;

that I will perform noncombatant service in the Armed Forces of the United States when required by the law;

that I will perform work of national importance under civilian direction when required by the law;

and that I take this obligation freely without any mental reservation or purpose of evasion: SO HELP ME GOD. In acknowledgment whereof I have hereunto affixed my signature.

Subscribed and sworn to (affirmed) before me this 13th day of May, 1965

Jonny J. Astrup
(Signature of Petitioner)

NOTE: In renunciation of title or order of nobility, add the following to the oath of allegiance before it is signed: "I further renounce the title of (give title or order) which I have heretofore held," or "I further renounce the order of nobility (give order of nobility) to which I have heretofore belonged."

Petition granted and Certificate No. [illegible] issued. Ineligible under Sec. 316 (a) - file 14
Petition denied: List No. .....
Petition withdrawn: May 1960 - submitted - See file.
Admitted to Citizenship - Naturalization
Order "Petitioner admitted to citizenship" August 21, 1965 See file.
Certificate of Naturalization No. [illegible] issued Sept. 27, 1965
Order "Petition for Naturalization denied" Sept. 27, 1965
Order "Petition for Naturalization granted" Nov 15, 1965

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
ATTEST:
C. C. EVENSEN,
Clerk, U. S. District Court
Northern District of California
June R. Seaber
Deputy Clerk
Dated February 3, 1969

[R.T.2]

In the District Court of the United States in and for the Northern District of California at San Francisco

Petition for Naturalization of Ib Otto Astrup	No. 168753

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF DESIGNATED NATURALIZATION EXAMINER

To the Honorable, the Judges of the United States District Court for the Northern District of California

I

The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of Denmark, age 41 years, who has resided in the United States continuously since his lawful admission for permanent residence on February 20, 1950, filed the petition for naturalization numbered above on May 14, 1965, under the provisions of section 316(a) of the Immigration and Nationality Act, 8 U.S.C. 1427.

The question presented is whether the petitioner has established that he is not barred from naturalization by virtue of the provisions of section 315 of the Immigration and Nationality Act, 8 U.S.C. 1426, the question arising by reason of the fact that on Novem-

ber 15, 1950, on his own request, the petitioner was exempted from training and service in the Armed Forces of [R.T. 3] the United States on the ground of alienage.

II

The petitioner's occupation is that of food store manager. He was married on June 12, 1960, to a native and citizen of Denmark and as of the date of the filing of the petition, had one child, a boy, born on February 11, 1964. The chronology of events pertinent herein is as follows:

November 23, 1926—Petitioner born in Denmark.

February 20, 1950—Petitioner admitted to the United States lawfully and for permanent residence.

About August 1950—Petitioner registered under the Selective Service Act of 1948.

September 1950—Petitioner completed Classification Questionnaire (Not sworn to, question as to classification he felt appropriate—page 7—not answered).

September 20, 1950—Classified I-A (then age 23 years) and ordered to report for induction.

October 11, 1950—Examined and found acceptable for service.

November 3, 1950—Ordered to report for induction on November 17, 1950.

November 14, 1950—Executed SSS Form 130—Request for exemption on the ground of alienage.

November 15, 1950—Re-classified IV-C.

August 6, 1952—Re-classified I-A.

August 18, 1952—Ordered to report for medical examination.

September 2, 1952—Examined and found not physically fit for military service. Deferred for three months.

November 24, 1952—Classified V-A, over 26 years of age. [R.T. 4]

III

The petitioner was required to register by section 3 of the Selective Service Act of 1948, c.625, 62 Stat. 604. Section 4(a) of that Act provided in pertinent part as follows:

> "* * * * * * Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if prior to his induction into the Armed Forces, he has made application to be relieved from liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

Executive Order 9992 of August 28, 1948 (Published 13 F.R. 5033, August 31, 1948) in pertinent part read as follows:

> "6. Section 622.18 of Part 622, Classification Rules and Principles, is amended to read as follows:

Section 622.18 Class IV-C: Aliens. * * * *

(c) In Class IV-C shall be placed any registrant who is an alien and who, prior to his induction, has made application to be relieved from liability for training and service in the Armed Forces of the United States by filing with the local board an Application by Alien for Relief from Military Service (SSS Form No. 130), executed in duplicate. The local board shall forward the original of such form to the Director of Selective Service through the State Director of Selective Service and shall retain the duplicate in the registrant's cover sheet (SSS Form No. 101.)"

It will be noted that under the foregoing quoted sections, *any* alien in the United States could claim exemption on the ground of alienage.

On June 19, 1951, the Selective Service Act of 1948 was amended. Among other changes, the title was changed to read "Universal Military Training and Service Act" and the exemption available to aliens admitted for permanent residence was eliminated. Section 4(a) Universal Military Training and Service Act. 65 Stat. 75, 50 U.S.C. Appendix 454. **[R.T. 5]**

Executive Order 10292 of September 25, 1951, (Published 16 F. R. 9862, September 28, 1951) amended the Selective Service Regulations to carry out the legislation. Section 1622.42 relating to IV-C aliens then read in pertinent part as follows:

"Section 1622.42 Class IV-C: Aliens. * * * *

(b) In Class IV-C shall be placed any registrant who is an alien and who has not been admitted to the United States for permanent

residence but who has remained in the United States for a period exceeding one year and who has, prior to his induction, made application to be relieved from liability for training and service in the armed forces of the United States by filing with the local board an Application by Alien for Relief from Training and Service in the Armed Forces (SSS Form No. 130), executed in duplicate. * * * *

(c) In Class IV-C shall be placed any registrant who is an alien and who is certified by the Department of State to be or otherwise establishes that he is, exempt from military service under the terms of a treaty or international agreement between the United States and the country of which he is a national."

Preliminarily, it may be stated that at all times mentioned herein, there was no treaty between the United States and Denmark exempting the nationals of one country from military service in that of the other.

The initial question to be determined is whether the petitioner understood the forms he was signing and made an intelligent choice when he applied for exemption.

In his application for an immigrant visa executed before the United States Consul at Copenhagen, Denmark on November 22, 1949, the petitioner stated that he was "able to speak, read and write the following languages or dialects: Danish, English". In a continued Designated Examiner Hearing on September 2, 1966, the petitioner stated that he had attended school for eight years prior to coming to the United

States; that this would be the equivalent of finishing high school; that he continued his education on a **[R.T. 6]** part time basis thereafter; that when he came to the United States he could speak a little English because he had studied it at school; that in the United States he worked as a grocery clerk mostly among English speaking people and that he could read English fairly well. When he planned to come to the United States he understood that there was no draft law in effect; that if he knew he might have to serve he would not have come to the United States; that he had served in the Danish Navy for 14 months and that he planned to return to Denmark after a year or at most two years from the time of his arrival in this country. Later, when he had acquired ties in the United States, and when he was reclassified I-A in 1952, he had decided to remain and was willing to serve. He admits having read the application for exemption from military service.

The form signed by the petitioner on November 14, 1950, read in part:

> "I hereby apply for relief from liability for training and service in the armed forces of the United States. I have read the NOTICE given below, and I understand that I will forever lose my rights to become a citizen of the United States, and I may also be prohibited from entry into the United States or its territories or possessions as a result of filing this application."

The "NOTICE" referred to was as follows:

> "Section 4(a) of the Selective Service Act of 1948, provides in part that "any citizen of a foreign country, who is not deferrable or exempt

> from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title, if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who make such application shall thereafter be debarred from becoming a citizen of the United States." (Underscoring supplied.) Under other existing law, an alien who is not a permanent lawful resident of the United States at the time of execution of this application, thereafter becomes barred from ever making [R.T. 7] an entry for permanent residence into the United States, including Alaska, Hawaii, Puerto Rico, and the Virgin Islands, unless he enters as a minister of any religious denomination or as a professor of a college, academy, seminary, or university."

It seems clear that the petitioner does not come within the rule of Moser v. United States, 341 U.S. 41 (1951).

The petitioner's eligibility for naturalization must be determined under section 315 of the Immigration and Nationality Act, 8 U.S.C. 1426, which reads in part as follows:

> "(a) Notwithstanding the provisions of section 405(b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was re-

lieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien."

In Ceballos v. Shaughnessy, 352 U.S. 599, 1 L. Ed. 583, 77 S. Ct. 545, it was stated "Section 315 of the 1952 Act enacts a two-pronged requirement for the determination of permanent ineligibility for citizenship; the alien must be 'one who applies or has applied for exemption', and also one who 'is or was relieved or discharged from such training or service on such ground.'" 352 U.S. at 606.

This section is retrospective. United States v. Mirzoeff, 2d Cir. 1958, 253 F. 2d 671, affirming In re Mirzoeff, DCNY 1956, 143 F. Supp 177. See also In re Aklins Petition, USDC ED NY 1963, 222 F. Supp 857, affirmed 340 F. 2d 746.

There can be no question but that the petitioner applied for and was [R.T. 8] granted exemption for liability for military service on the ground of alienage. The sole issue to be determined is whether he was "effectively" relieved since his deferred classification was revoked without any action on his part and had he been found physically fit, he might well have found himself inducted.

It is the view of the Immigration and Nauralization Service that if the petitioner had been inducted

he would be eligible for naturalization within the rule of the United States v. Lacher, 9th Cir, 1962, 299 F. 2d 919; United States v. Hoellger, 2d Cir, 1960, 273 F. 2d 760. However, he was not inducted, he performed no military service, and hence the rule in those cases does not apply.

This is not a case of first impression in the Ninth Circuit. The facts are very similar to those in the case of Lapenieks v. Immigration and Naturalization Service 389 F. 2d 343, affirming Petition of Lapenieks, USDC California SD 1965, 249 F. Supp. 398. In that case the petitioner was born in Latvia on November 10, 1931, entered the United States in 1952, registered that same year under the Universal Military Training and Service Act, was classified I-A in October 1952, applied for exemption on the ground of alienage on November 15, 1952, and was classified IV-C on November 20, 1952. On March 1, 1956, his IV-C classification was revoked and he was reclassified I-A, available for military service. On August 20, 1957, he was classified IV-F after a physical examination. His petition was denied because of his claim of exemption on the ground of alienage.

The majority opinion holds that the petitioner was "effectively" relieved from service because he was in IV-C classification from November 20, 1952, to March 1, 1956, a time when the Korean hostilities were taking place. **[R.T. 9]** Justice Duniway dissented, stating in effect that the length of the deferment and the fact that hostilities were taking place during that

period were immaterial; the reclassification into I-A eliminated his exemption and hence should eliminate his ineligibility for citizenship. Justice Duniway felt that the rule in the Lacher case, supra, and the cases relied thereon should apply.

Since the petitioner in the instant case was placed in a deferred classification on the ground of alienage, that is IV-C, and was in that deferred classification from November 15, 1950, to September 2, 1952, and since he never did serve in our armed forces, and this deferment was made at his request, he was "effectively" relieved from military service and comes within the rule of the Lapenieks case, supra. The petition should be denied.

IV

Pursuant to the provisions of section 335 of the Immigration and Nationality Act, 8 U.S.C. 1446, I hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT:

(a) That the petitioner is an alien and filed a petition for naturalization on May 14, 1965, under the provisions of section 316(a) of the Immigration and Nationality Act;

(b) That the petitioner on February 20, 1950, entered the United States lawfully and for permanent residence and at all times since then and now is a lawful permanent resident of the United States;

(c) That the petitioner was obligated to and in August of [R.T. 10] 1950 did register under the Selective Service Act of 1948;

(d) That on November 14, 1950, the petitioner applied to be relieved from liability for training and service in the armed forces of the United States on the ground that he was an alien;

(e) That when he applied for exemption from military service on the ground of alienage the petitioner knew full well that he would thereby become permanently ineligible for citizenship in the United States;

(f) That the petitioner was relieved from liability for military training and service in the armed forces of the United States on the ground of alienage on the basis of his application for relief on that ground;

(g) That on August 6, 1952, the petitioner was classified I-A available for military service, without a request therefor by him or anyone acting on his behalf;

(h) That on September 2, 1952, the petitioner was examined and found not physically fit for military service;

(i) That on November 24, 1952, the petitioner was classified V-A because he was then over the age for induction, to wit, 26 years.

CONCLUSIONS OF LAW:

(a) That the petitioner applied for and was granted exemption from liability for training and service in the armed forces of the United States because of alienage;

(b) That the petitioner has failed to establish that he is not [R.T. 11] barred from naturalization by virtue of the provisions of section 315 of the Immigration and Nationality Act. 8 U.S.C. 1426.

V

I recommend that this petition for naturalization be DENIED on the ground that the petitioner is barred from naturalization under the provisions of section 315 of the Immigration and Nationality Act, 8 U.S.C. 1426.

/s/ F. P. Boland
Designated Naturalization Examiner

5/22/68
Date [R.T. 12]

U.S. Exhibit No. 1
Filed May 22, 1968
James P. Welsh, Clerk
/s/ By June A. Mecchi
Deputy Clerk

ADMINISTRATIVE PRELIMINARY EXAMINATION

United States Department of Justice
Immigration and Naturalization Service
Court No. 245

Petition No. 168753

Petition for Naturalization
or
Ib Otto Astrup

PRELIMINARY EXAMINATION

Date:	September 2, 1966
Place:	San Francisco, California
Counsel for Petitioner:	None
Designated Examiner:	Francis P. Boland
Examiner Officer:	None
Interpreter	None
Stenographer:	Statement taken on record by Designated Examiner

Examiner to Petitioner:

Q. From my preliminary conversation with you, I have concluded that you are able to speak and understand the English language. Is this conclusion a correct one?

A. Yes, it is.

Q. In this same connection, you are advised that if, at any time during the proceeding which is to follow, you do not understand a question I might ask you, I shall restate or rephrase it upon

request, until there is a full comprehension on your part. Do you understand?

A. Yes, I do.

Q. You are now informed that I, Francis P. Boland, am a naturalization examiner of the Immigration and Naturalization Service, duly designated under, and authorized by, Section 335(b) of the Immigration and Nationality Act to conduct preliminary examinations on petitions for naturalization and to make recommendations to the courts regarding the petitioner's qualifications for admission to citizenship. As a designated examiner, it is my purpose at this time to conduct a further preliminary examination on your petition for naturalization as a basis for formulating a recommendation to the court [R.T. 13] regarding your eligibility for admission to citizenship. Do you understand?

A. Yes, I do.

Q. At this preliminary examination you have the right to be represented by counsel of your own choice and at your own expense. Such counsel may be an attorney at law or any other person qualified to practice before the Immigration and Naturalization Service. Do you understand?

A. Yes, I do.

Q. Do you desire to have an attorney or someone else to represent you during this preliminary examination?

A. No, I don't.

Q. I now advise you that if at any time during this preliminary examination you make known your wish to obtain representation by counsel, I will continue the proceeding to afford to a reasonable opportunity to do so. Do you understand?

A. Yes, I do.

Q. You are further advised that any statement you may make during this preliminary examination shall be voluntary and that it may be used against you in any criminal or civil proceedings. Do you understand and are you willing to make a statement under such conditions?

A. Yes, I am.

Q. You are also informed that your statements during this preliminary examination will be made under oath and that under the law anyone who knowingly makes a false statement under oath in any naturalization proceeding may be subject to fine, imprisonment, or both. Do you understand and are you willing to make a statement under oath?

A. Yes, I am.

Q. During this preliminary examination, you have the right to offer evidence to establish your eligibility for naturalization or meet any evidence adverse thereto which may be presented by the government, to present witnesses in your own behalf and to cross-examine witnesses called by the government. Do you understand?

A. Yes, I do. **[R.T. 14]**

Q. Please stand and raise you right hand. Do you solemnly swear that the statements you are about to make during this preliminary examination will be the truth, the whole truth, and nothing but the truth, so help you God?

A. Yes, I will.

Q. Are you the same Ib Otto Astrup who filed Petition No. 168753 in the United States District Court at San Francisco on May 14, 1965?

A. Yes, I am.

Q. You are advised that this statement which you make today will be transcribed and designated Exhibit 1. The documents which are offered and received in evidence will be designated Exhibit 1-A, 1-B, and so on in sequence. Do you understand?

A. Yes, I do.

Q. I will show you an application to file a petition for naturalization, Form N-400, and ask if that is your signature on Page 4 in the jurat, that is the sworn to part under the affidavit?

A. Yes, it is.

Q. I will show you two sheets of paper, one designated supplemental Page one N-400 and the second supplemental Page 2, N-400 and ask if those are your signatures on the pages.

A. They are both mine.

Q. Do you have any objection to this application with the two supplemental pages being accepted and received in evidence at this proceeding?

A. No, I don't.

Q. Do you have any objection to the court considering these papers if and when your case comes on for hearing before the judge on the merits?

A. No, I don't.

Q. I will show you Form N-422 addressed to Mr. Ib Otto Astrup, file A7 425 039 on one side and to Selective Service System on the other side, with a report on that side, dated 13th July 1965, signed by an F. W. Spearman. Do you have any objection to that form being accepted and received in evidence for consideration at this hearing and at the hearing before the judge in court?

A. No, I don't. **[R.T. 15]**

Q. Going back, the Application to File a Petition for Naturalization and the two supplemental pages will be designated as Exhibit 1-A. The Form N-422 will be designated as Exhibit 1-B. I will show you photostatic copies of certain documents from the Selective Service System, including Classification Questionnaire and Application by Alien for relief from training and service in the Armed Forces, the latter being SS Form No. 130, and ask you if you have any objection to these photostatic copies of the records of the Selective Service being accepted in evidence?

A. No, I don't.

Q. Do you have any objection to our considering these documents at this hearing or the judge considering them at the final hearing in court?

A. No, I don't.

Q. I will call your attention to Classification Questionnaire in Exhibit 1-C, the Selective Service System copies being designated as Exhibit 1-C, and ask you if that is your signature on Page 7 of Classification Questionnaire.

A. Yes, it is.

Q. I will show you SS Form No. 130, Application by Alien for Relief from Training and Service in the Armed Forces, and ask you if that is your signature on that form?

A. Yes, it is.

Q. Do you recall signing that form before a notary public?

A. Yes, I did.

Q. I will show you Statement of Dependent Over 18 Years of Age, consisting of three pages, and ask if that is your mother's signature on Page 3 of the form.

A. Yes, it is.

Q. You were born in Denmark on November 23, 1926, were you not?

A. Yes, I was.

Q. How far did you go in school before you came to the United States?

A. I went to school for eight years.

Q. What would that be equivalent to in the United States?

A. It would be equivalent to finishing high school. I went into school at the age of seven and came out at the age of fifteen and one half. [R.T. 16]

Q. Did you go to school afterwards?

A. Yes, I did.

Q. Did you go to school at night or full time in the daytime?

A. I went night school and part time day school.

Q. How long did you go to school in that manner?

A. For three and a half years.

Q. What was your occupation before you came to the United States.

A. That was grocery clerk.

Q. Could you speak English before you came to the United States?

A. A little.

Q. Had you studied English in school?

A. Yes, I had.

Q. How much time had you devoted to studying English before you came to the United States?

A. The last year before coming to the United States, which would be in 1949. I spent the last winter, about eight months of one night a week studying English.

Q. Your file shows that you entered the United States as an immigrant on February 20, 1950. Had you ever been in the United States prior to that time?

A. No, I had not.

Q. What type of work did you do after you came to the United States?

A. I went to work in a grocery store.

Q. Were the customers Danish speaking or English speaking people?

A. They were English speaking people.

Q. Did you have any difficulty with the English language once you arrived in the United States?

A. Oh, I had a little bit, yes.

Q. Could you read and write English at the time you arrived in the United States?

A. I could read it fairly well.

Q. Could you write English?

A. Fairly well. [R.T. 17]

Statement by Ib Otto Astrup, 245-P-168753(Contd)

Q. How soon after your arrival in the United States did you register for the draft?

A. Exactly six months after.

Q. Then that would have been approximately August of 1950, would it not?

A. Yes, it would.

Q. What were the circumstances surrounding your claim of exemption from the draft?

A. The circumstances surrounding the application for deferrment, is that what you are getting to now?

Q. Yes, it is.

A. When I left Denmark, there was no draft law in the United States and that was reenacted,

I believe, in July of 1950 and my feeling at the time was if the law had been in effect when I got my visa, I would not have gone.

Examiner (for the Record):

The Application for Immigration Visa and Alien registration, executed by the petitioner on 22 November 1949, does not contain instructions in regard to registration for the Selective Service System. This application was executed before the Consul of the United States at Copenhagen, Denmark.

Examiner to Petitioner:

Q. After you arrived in the United States and registered for the draft you were furnished a Classification Questionnaire, which is indicated as having been mailed September 5, 1950. Subsequent to completing that questionnaire, were you notified to report for induction?

A. Yes, I was.

Q. After you received that notification to report for induction, did you apply for exemption from the draft?

A. I applied for the exemption from the draft. I guess it was the first part of November, I don't recall exactly.

Q. How did you bring to the attention of the draft board, your desire not to be inducted? Did you initially tell the board or did you contact your Consul for Denmark or the Danish Embassy?

A. I contacted the Danish Consul in town, that is San Francisco and he was the one who told me what I could do and what I could not do. **[R.T. 18]**

Q. Did you contact the Danish Consul before you signed this DDS Form 130, that is the Application by Alien for Relief from Training and Service?

A. To my knowledge, I contacted him on only the one occasion.

Q. Would that be before or after you executed the Defense Department Form 130?

A. That was before.

Q. What were the circumstances surrounding your signing the Application by Alien for Relief from Training and Service?

A. Will you rephrase that?

Q. The file of the Selective Service System, relating to you, contains SS Form 130, Application by Alien for Relief from Training and Service, dated November 14, 1950. It is subscribed and sworn to before a notary on the 14th of November, 1950. You have indicated that that is your signature.

A. Oh, yes, that is it, but I——

Q. What I am getting at is, what were the circumstances surrounding the signing of that form? Did you sign that in the presence of that notary public?

A. I signed that in the presence of the notary public.

Q. Did any one explain the form to you before you signed it?

A. Yes, they did.

Q. Who explained it to you?

A. The local draft board.

Q. Where was that?

A. On Mission (and looking at the form) 2959 Mission Street.

Q. Did you read the part on the form under the word "Notice" which states that you would be forever debarred from becoming an American citizen if you made the application for relief from the draft?

A. Yes, I did.

Q. And did you still go ahead and sign the form?

A. Yes, I did.

Q. What was your basic reason for desiring to be exempted from the military service?

A. I would say that there were three reasons at the time. First, I have said it already. There was no draft law when I left Denmark for the United States. Secondly, after being here for shorter than [R.T. 19] eight months, I did at the time not have any desire to stay and I had planned at the time when I left Denmark to stay a year or a year and a half or at the most two years in the United States. And thirdly, I had prior to leaving Denmark served 14 months in the Danish Navy.

Q. Didn't your mother's dependency on you have some factor also?

A. It did have some factor on it. That was another reason why I wanted to go back to Denmark.

Q. Was your mother dependent upon you for support at that time?

A. Not for support, no.

Q. Your mother's affidavit on Page 1 states that you had supported her for three years in the entirety, that is, you had wholly supported her for three years prior to the date of the affidavit, which is September 25, 1950. Was that statement correct?

A. Yes, it was.

Q. How much did you contribute to your mother's support each month during 1950?

A. Oh around $50.00, I believe.

Q. Returning to the execution of the Application for Relief from Training and Service, do you recall who was present in the office of the Selective Service System when it was read and explained to you?

A. No, I don't.

Q. Do you recall how many people were present in connection with your application for Relief?

A. As far as I can remember there was only one. A man.

Q. Was he the one who swore you to the form?

A. No, he was not.

Q. Then who did swear you to the form? A person present in the office of the Selective Service System?

A. No. They told me to go to the nearest notary and have it done there, because they would not do it.

Q. Then, as I understand it, you went into the office of the Selective Service System, obtained the form there, went out to a notary, had it executed, then did you return with the form to the Selective Service System and turn it in to them? **[R.T.20]**

A. I don't recall if I mailed it or if I went in person.

Q. Then, is there any possibility that you did not understand that by signing this form you would be forever debarred from becoming a citizen of the United States?

A. No, there was not.

Q. Returning to a remark that you made earlier to the effect that you had only one contact with the Danish Consul. The file suggests that you had another contact with a Danish Consul.

A. Yes, but that was later. Two years later.

Q. Then your statement that you had only one contact with the Danish Consul would have been referring to the incidents which occurred prior to the signing of the Selective Service Application for Relief and Training?

A. Right.

Q. Can you recall what the Danish Consul told you in regard to executing the Application for Relief from Training and Service?

A. In 1950?

Q. Yes.

A. Yes, I can remember what he said. He told me exactly what it said on that form.

Q. And you still desired to go ahead and execute the form?

A. I weighed the problem and decided that I was doing the right thing.

Q. Subsequently the Selective Service System reclassified you and ordered you to report for induction, did they not?

A. Right. In 1952.

Q. The Minutes of Action by Local Board and Appeal Board of the Selective Service System indicates that you were classified 1-A on August 6, 1952. Do you believe that that is a correct date when you were classified 1-A?

A. Yes, that is about right.

Q. The Minutes of Action by the local board showed that they mailed you an order to report

for induction on August 18, 1952. Would that be about right?

A. Right.

Q. Did you report for induction?

A. Yes, I did. **[R.T. 21]**

Q. What happened when you reported for induction?

A. I was given a physical examination, reclassified—no and for three months I was temporarily deferred.

Q. Then what happened?

A. And then after the three months, I was mailed a classification as 5-A, I believe, two days after my 26th birthday.

Q. Is there anything else that you would care to add to the problem which is confronting our Service and the judge before whom your case will undoubtedly be called, that is in regard to your claim of exemption?

A. Not in regard to the claim of exemption, but in regard to what I did in 1952 when I was told that the exemption was no more valid and I found out through questioning the local board and I contacted the Danish Consul once again, I decided that the only thing was to report for induction.

Q. At that time, had you changed your mind as to remaining in the United States?

A. At that time, I had.

Q. At that time, did you intend to reside permanently in the United States, that is, I'm not referring to any tempoary absences on visits, but to make your home in the United States, make your living in the United States and bring up your children, if any at that time, in the United States?

A. Yes, I had changed my mind and when I was reclassified, I realized that I had to make up my mind, whether I would stay in the United States, or go home.

Q. Then you decided that you would make your home in the United States?

A. Right.

Q. Is there anything else you wish to add to what you have said before in regard to any of the matters on which we touched?

A. No, there is not.

Q. At the present time, if the United States ask you to serve in our Armed Forces, would you do so?

A. I sure would. [R.T. 22]

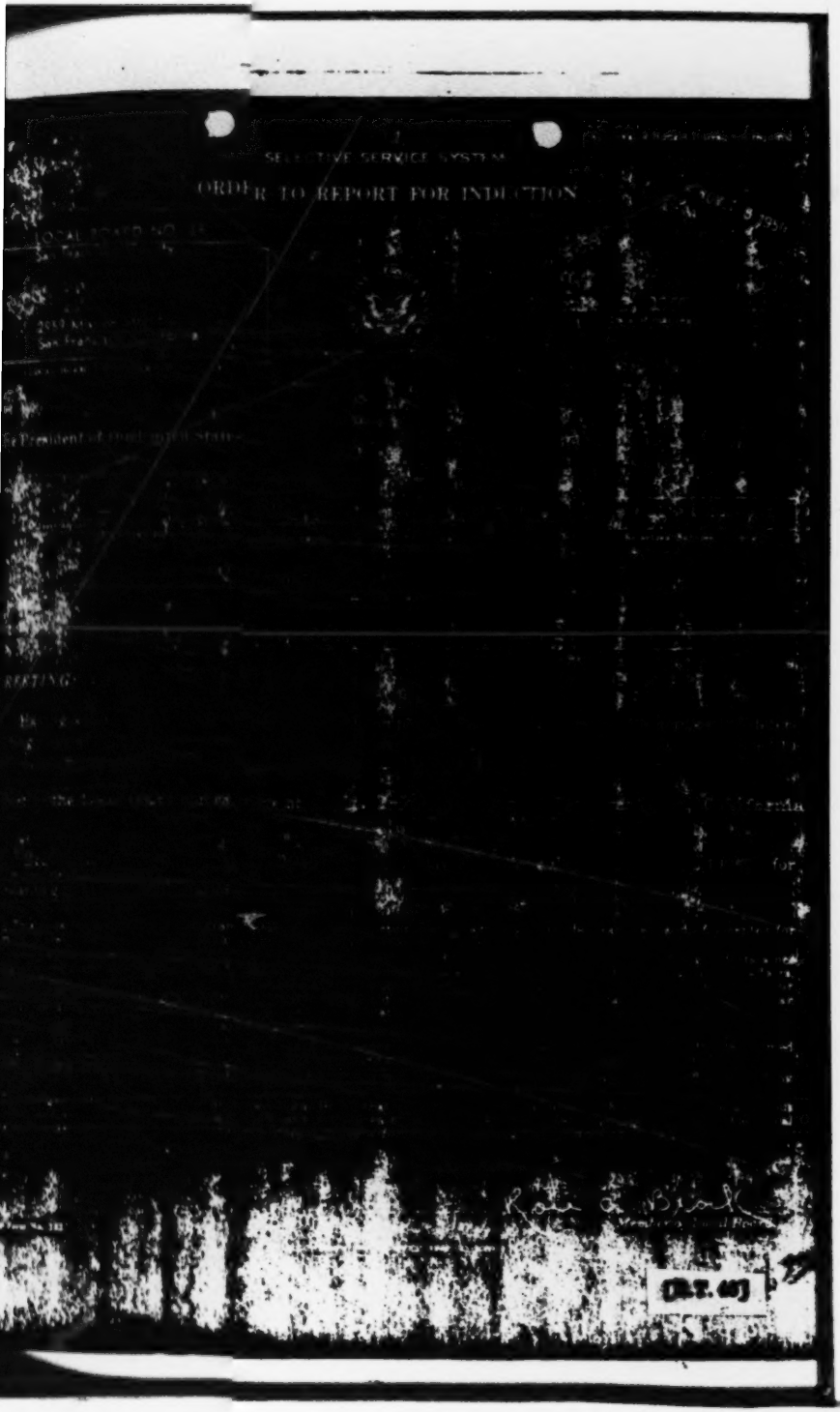
I certify that the foregoing is a correct and complete record of the examination conducted before me this date.

F. P. Boland

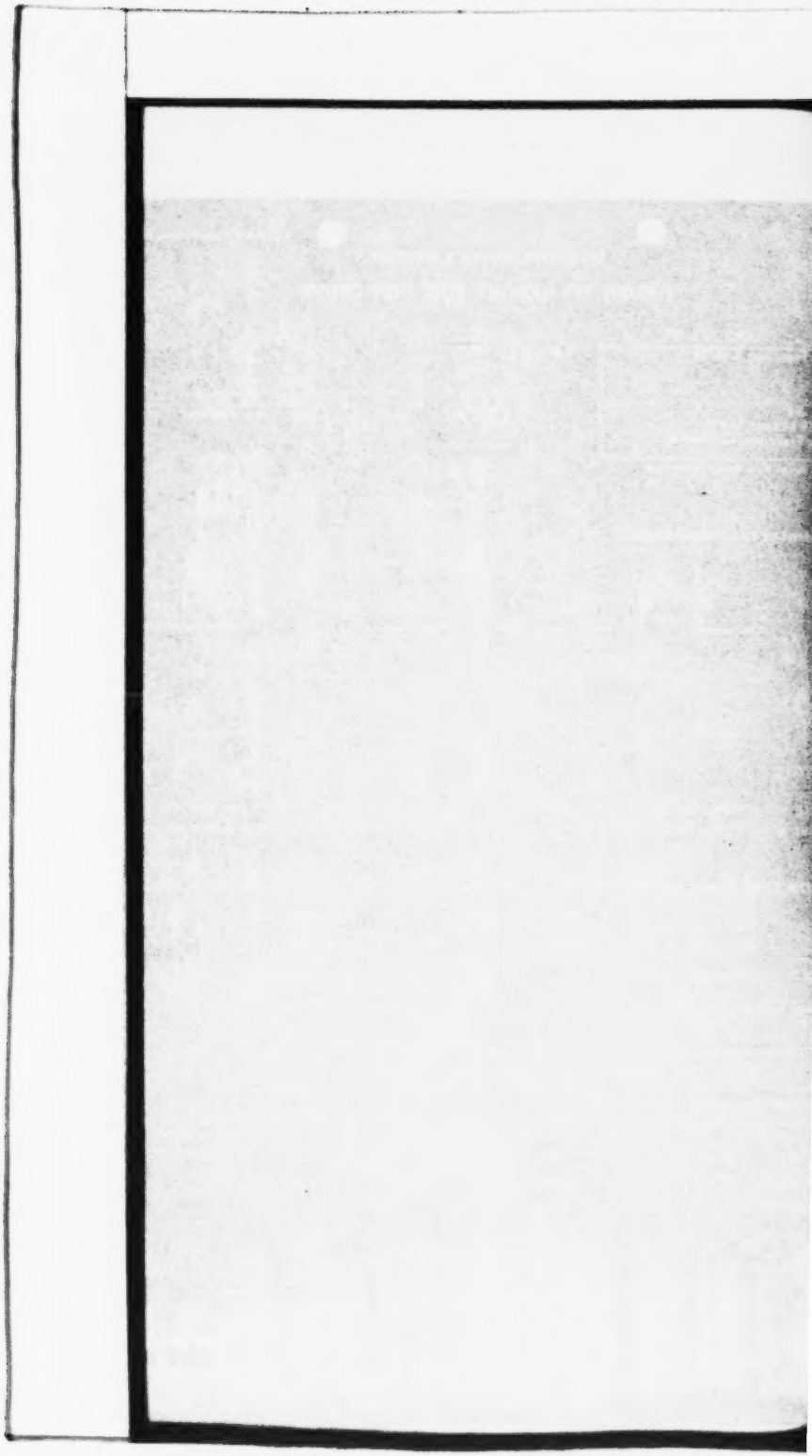
Francis P. Boland, Designated Examiner

I certify that the foregoing is a true and correct transcript of a mechanically recorded record made during this preliminary examination.

Faye Lothridge, Transcriber [R.T. 23]


SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR INDUCTION



CERTIFICATE OF ACCOUNTABILITY

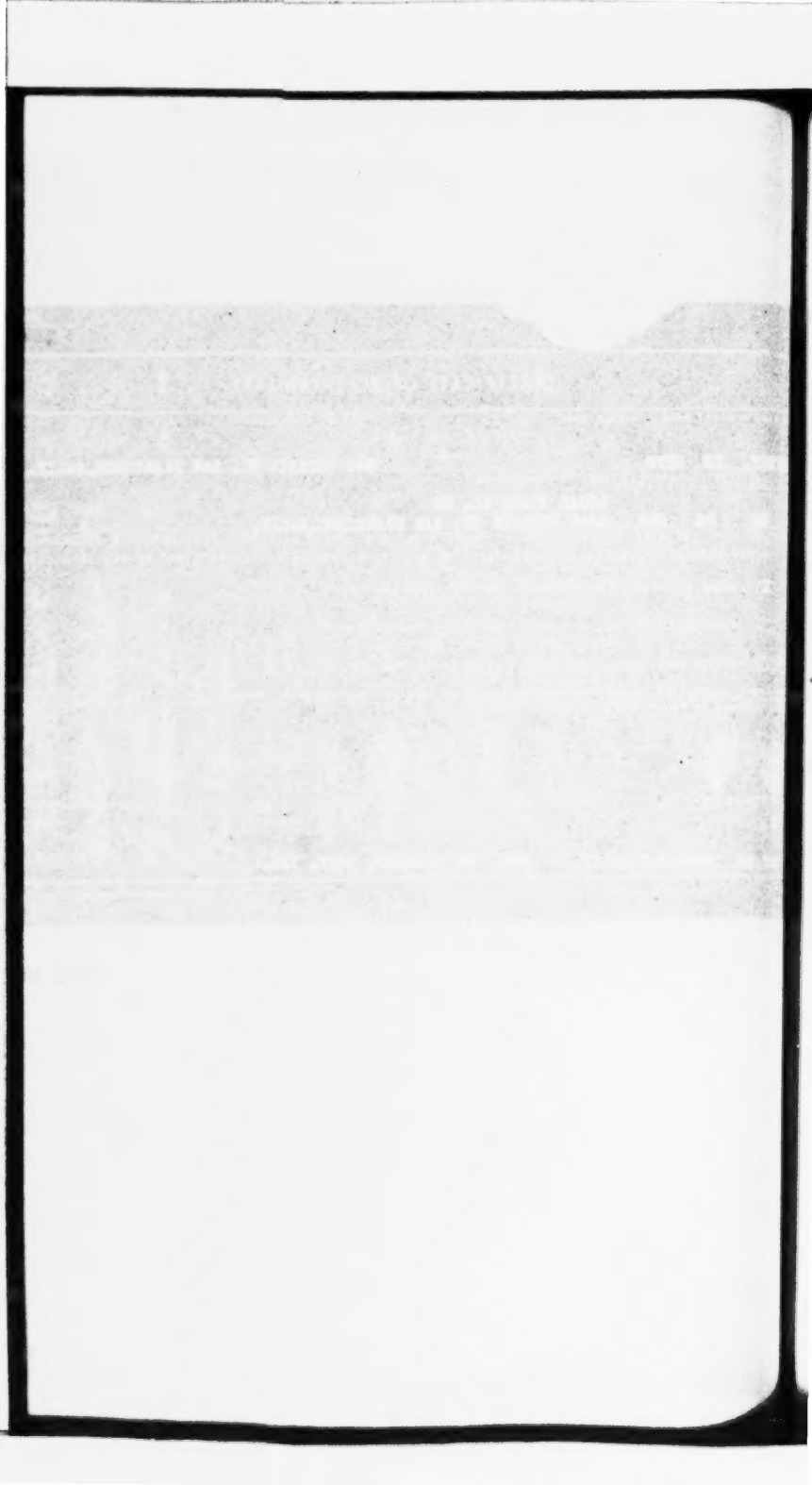
ARTHUP, IR OTTO 640 OCTAVIA ST. SAN FRANCISCO, CALIF.

LOCAL BOARD NO. 89
29 26 GLS 2959 MISSION ST. SAN FRANCISCO, CALIF.

I

OCT, 40 PRES. S.F. CALIF. CARL H. WORDLEY, CAPT. INF.

[R.T. 49]



TESTIMONY OF IB OTTO ASTRUP
(Reporter's Transcript of July 16, 1968)

THE WITNESS: Ib Otto Astrup.

DIRECT EXAMINATION

BY MR. KRAUSE:

Q. Mr. Astrup, be sure to speak up now so everyone can hear you. Are you the petitioner in this application to be admitted to United States citizenship?

A. Yes, I am.

Q. And where were you born?

A. I was born in Denmark.

Q. What is your age at the present time?

A. Forty-one.

Q. Forty-one did you say?

A. Yes, forty-one.

Q. And what is your present occupation?

A. I'm in the grocery business. I'm store manager for a chain in Oakland.

Q. And whereabouts do you live?

A. I live in Walnut Creek.

Q. What is your family status?

A. I'm married, I have one son.

Q. How old is your son?

A. Four years old.

Q. When was it that you got married? [J.R.T. 4]

A. Well, I got married second time was in 1960.

Q. Now, I just want to summarize a few dates, and you tell me whether this is correct.

I just want you to tell me whether this summary, which is from the record, is correct. You entered the United States in February of 1950?

A. Yes, I did.

Q. And you registered for the Selective Service System in August of 1950?

A. Correct.

Q. And you claimed an exemption as an alien in November of 1950?

A. That's right.

Q. Then in 1952, in August, you were reclassified I-A and ordered to report for induction in September of 1952?

A. That is right.

Q. And in September of 1952 you reported and you were found to be physically unfit and were not taken; is that right?

A. That's right, yes, I was deferred for 90 days.

MR. KRAUSE: Now, I might interject, Your Honor, the reason why there was a change is that the law was changed in 1952 to change the situation about an alien's responsibility under the Selective Service act. **[J.R.T. 5]**

Q. Now, for what purpose, Mr. Astrup, did you enter the United States in 1950?

A. Well, I felt like—I had a brother over here, and I felt like I would like to come over here to United States and find out if I would like to live here as much as my brother did, and at the time that I entered, the first year or so I was not of any mind, or so to speak, whether I wanted to make it a permanent place to live.

Q. In other words, when you entered in 1950, you did not have any decision as to whether you would permanently reside in the United States?

A. Absolutely not, no.

Q. Now, I'm going to show you, after showing it to Mr. Boland, a Xerox copy of a matter which is in the record before Your Honor, which is Selective Service Form No. 130, application by an alien for relief from training and service in the Armed Forces. You recognize that as a photocopy of a document that you signed (showing to witness)?

A. (Examining) Yes, I do.

Q. Now, would you tell us how it is that you signed that document?

A. My reason for it?

Q. Yes. **[J.R.T. 6]**

A. My reason for it was, at the time that I was drafted that I was kind of a young man, little confused whether I wanted to stay, whether I wanted to stay here or go back home, at that first seven, eight or nine months I hadn't made up my mind, and when I got my draft notice, it upset my thinking a lot more, because I knew I had to make a decision one way or the other, but if I went in the United States Army for two years, since I just come out of the Danish Navy after fourteen months, just before I went over there—before I came to United States, and I just felt if I did go in it would make me more or less permanent over here, and I just decided that since I was—I had this right, that I would sign the——

Q. In other words, is it correct to say that you—at the time you signed that document in November of 1950, you were not sure whether you wanted to stay in this country?

A. Right.

Q. Now, at the time you signed that document, what was your belief as to what it granted you as an exemption from the United States Military Service?

A. That it would grant me a permanent exemption.

Q. Was it your belief that if you signed that waiver of the right to be a United States citizen, that you would be permanently exempt from the Selective [J.R.T. 7] Service System?

A. Yes, that was my impression.

Q. Was there any language in that document which you signed which led you to believe that?

A. Says right here, "Shall be relieved from liability for training and service under this title."

Q. And you construed that to mean shall be permanently relieved?

A. Right.

Q. Now, at the time you signed that document, Mr. Astrup, or any time before, did anyone ever tell you that that exemption from military service could be removed?

A. No, absolutely not.

Q. Mr. Astrup, if you had known at the time you signed that document that any time in the future the United States Government could remove that exemption from military service and call you in to the United States Army, and you would still be ineligible for United States citizenship, would you have signed that document?

A. No, I would not.

Q. Then, would it be correct to say that you signed that document under a misconception as to its legal consequences? [J.R.T. 8]

A. Yes, you can say that.

Q. Now, I want to move on to 1952, when you were ordered to report for induction, at that time did you believe that you would be actually taken into the Army?

A. Absolutely.

Q. Were you employed at that time?

A. Yes, I was.

Q. What did you do about your job?

A. I told my employer that I was being drafted and they wouldn't see me for two years, or whatever the term was at that time.

Q. And was there any feeling in your mind that you would be found physically unfit?

A. No, absolutely not.

Q. In other words, you had no reason to believe

A. Well, except for that little bursitis that I had, and that they—that the Army doctors diagnosed and came up with, I absolutely hadn't expected any medical deferment at all.

Q. You had not expected a medical deferment?

A. No, absolutely not.

Mr. Krause: I see. No further questions.

CROSS-EXAMINATION

BY MR. BOLAND:

Q. Mr. Astrup, on September 2nd, 1966, you made a **[J.R.T. 9]** statement to me in the Office of Immigration & Naturalization Service in regard to your claim of exemption?

A. Statement, yes.

Mr. Krause: May he see that, Your Honor, if he's going to be questioned about any statement.

Mr. Boland: Furnished a copy to counsel, and he should have a copy there.

Q. Do you recall having made that statement (showing to witness)?

A. (Examining) You mean this whole—the conversation?

Q. Yes.

A. Yes, I do, sir.

Q. And were the statements that you made at that time true and correct?

A. Yes, they were.

Q. Are there any changes that you would like to make in the statement that you made at that time?

A. Except for what I just said now concerning—what specific in here are you meaning, Mr. Boland?

Q. In other words, what I'm getting at mainly, you contacted the Danish Consul?

A. Right.

Q. For advice? **[J.R.T. 10]**

A. That's right, I contacted them for advice.

Q. You read the claim of exemption before you signed it?

A. The one in 1950?

Q. Yes.

A. Yes, I did.

Q. And you intended to go back home——

A. That was my intention——

The Court: Wait a minute until he finishes the question.

The Witness: Pardon me.

Q. Mr. Boland: After you had stayed a certain length of time. In other words, your trip to the United States was more of an exploratory trip?

A. Yes, it was.

Q. Than to come here permanently?

A. Right.

Q. And you did achieve what you asked for for at least two years? In other words, you were deferred for two years?

A. Right.

The Court: All right, the statement handed to the witness will be marked for identification in the record.

Mr. Krause: I think that's already in the record. [J.R.T. 11]

Mr. Boland: That's in—that's the report to the Court.

The Court: It's the statement of what date?

Mr. Boland: That's the statement of September——

Mr. Krause: September 2, 1966.

Mr. Boland: And it's attached as Exhibit 1-A.

The Court: So it's already in the record.

Mr. Boland: It's in the record.

The Court: Yes.

Mr. Krause: I have a question about that statement.

REDIRECT EXAMINATION

BY MR. KRAUSE:

Q. Mr. Astrup, would you turn to page 7?

A. Yes.

Q. Toward the middle of the page the question is, "Did anyone explain the form to you before you signed it," and your answer is, "Yes, they did."

A. Um-hmm.

Q. And the next question is, "Who explained it to you," and your answer is, "The local draft board."

In what way was the form explained to you by the local draft board?

A. It was handed to me by the, I suppose by the —was the head of that draft board, and in a very rude **[J.R.T. 12]** manner, like I was some not very desirable person for signing the thing, and he just told me, he said, "You can take it anywhere, have it notarized, I will have no part of it," and he walked away from me.

Q. Now, did he ever tell you that the United States Government reserved the right to take away that exemption from military service, and you would still be held to your part of the bargain, that is, you would never be able to be a citizen, did he ever tell you that?

A. No, he did not.

Mr. Krause: No further questions.

Mr. Boland: No questions.

(Witness excused.) **[J.R.T. 13]**

In the United States District Court for the Northern District of California

No. 168753

In re Petition for Naturalization
of
Ib Otto Astrup

MEMORANDUM OF DECISION

This petition for naturalization, brought by Ib Otto Astrup, a native and national of Denmark, is opposed by the Immigration and Naturalization Service.

On July 16, 1968 a hearing was held before this court, oral testimony was taken, and the matter submitted on briefs by both parties.

The undisputed facts of the case are substantially as follows:

On February 20, 1950 petitioner was admitted to the United States for permanent residence. On August 20, 1950 he registered with the Selective Service System. On November 14, 1950 he signed an "Application by Alien for Relief from Training and Service in the Armed Forces." On November 15, 1950, pursuant to Section 4(a) of the Selective Service Act of 1948 (50 U.S.C. App. § 454(a) (1950)), which provided an exemption from military training and service for aliens, his draft board classified him IV-C (alien not currently liable for military service). In 1951 Congress amended the Selective Service Act of 1948 so that Section 4(a) no longer provided a pro-

cedure for the exemption of resident aliens, and on August 6, 1952, pursuant to said [R.T. 77] *change,* petitioner's draft board re-classified him I-A (available for military service). On August 18, 1952 it ordered him to report for induction. On September 2, 1952 he was examined and found not physically fit for military service, and on November 24, 1952 his draft board re-classified him V-A (registrant over the age of liability for military service). On May 14, 1965 he filed the pending petition for naturalization.

The Immigration and Naturalization Service opposes this petition on the ground that petitioner is ineligible for citizenship by reason of having applied for and received exemption from military service within the meaning of Section 315(a) of the Immigration and Nationality Act (8 U.S.C. § 1426(a)), which provides:

> "Notwithstanding the provisions of section 405 (b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States."

Petitioner contends that for three reasons he is not ineligible for citizenship under Section 315(a).

First, he contends that he agreed to become permanently barred from obtaining United States citizenship in return for exemption from military training and service; that the government, by there-

after removing his exemption, failed to keep its part of the bargain; and that, therefore, he should not be bound to keep his part, citing and mainly relying upon the concurring opinion of Judge Moore in *United States v. Hoellger,* 273 F.2d 760, 766 (2d Cir. 1960).

Hoellger held that an alien whose IV-C classification had been removed by the draft because of the abrogation of [R.T. 78] treaty arrangements with Germany, under which he had been exempted from military service, and who was thereupon inducted into the military service, had not been relieved from service within the meaning of Section 315(a). The Court of Appeals for this circuit adopted *Hoellger* in *United States v. Lacher,* 299 F.2d 919 (9th Cir. 1962), where, similarly, the alien's IV-C classification was removed, and he was inducted into the military service. However, in *Lapenieks v. Immigration and Naturalization Service,* 389 F.2d 343 (9th Cir. 1968), *cert. denied,* 391 U.S. 951 (1968), where the alien's IV-C classification was also removed, but he was not inducted into the military service because, as in the instant case, he failed to pass the pre-induction physical, the court, refusing to extend *Hoellger,* held that the alien had been relieved from military service within the meaning of Section 315(a). We conclude that this court is bound by *Lapenieks,* and that, therefore, petitioner's first contention is without merit.

Secondly, petitioner contends that he signed the application for relief from military training and service under a misconception as to its legal consequences, in that he believed that by so doing he

would be permanently exempted from military
and he would not have signed the applicat
relief if he had known that the government r
the right to remove his exemption and call h
service; and that, therefore, he cannot be he
waiver of his right to become a citizen, citi
mainly relying upon *Moser v. United States,* 3
41 (1951).

In *Moser,* an alien applied for exemption fro
tary service, but, due to assurances made to
the Swiss legation and the U. S. State Departm
believed that he could do so without surrender
right to obtain U. S. citizenship. The Supreme
held that he was **[R.T. 79]** understandably lull
a misconception of the legal consequences of ap
for exemption and could not, therefore, be h
have waived his right to United States citizens

In the present case, petitioner testified that
he applied for exemption, he did not know th
government could later remove his exemptio
that, had he known this, he would not have a
for exemption. (R.T. of July 16, 1968 hearing
line 20 to p. 8, line 21). He has also testified
ever, that, when he signed the application for e
ion from military training and service, he kne
he would thereby become ineligible for United
citizenship. (Transcript of Preliminary Exam
by Naturalization Examiner, September 2, 19
7, 9). Therefore, unlike *Moser,* he was not lull
any misconception about the legal consequen
applying for exemption. Accordingly, the cour
that petitioner did knowingly relinquish his r

United States citizenship. *Moser* is therefore inapplicable, and petitioner's second contention is without merit.

Thirdly, petitioner contends that if he had been found physically fit, he would have served in the military and would now be eligible for citizenship under *United States v. Lacher, supra,* despite the fact that he was once relieved from service on the ground of alienage; and that to permit or deny citizenship on the basis of one's success in passing a military physical fitness test constitutes an unreasonable classification, violative of the due process clause of the Fifth Amendment.

No such claimed unreasonable classification is found in the statute itself, nor does it necessarily stem from the statute. Any such claimed unreasonable classification is **[R.T. 80]** merely the incidental result of the judicially declared rule of *Lapenieks* in this circuit, to the effect that upon facts similar to those in the pending case, an alien has been effectively relieved from service and is, therefore, ineligible for citizenship under Section 315(a). Therefore, petitioner's third contention is without merit.

Accordingly, it is the order of this Court that the petition for naturalization of Ib Otto Astrup be, and the same is, hereby denied.

Dated: November 14th, 1968.

/s/ W. T. Sweigert
United States District Judge **[R.T. 81]**

Filed November 15, 1968,
James P. Welsh, Clerk.

In the United States District Court for the Northern District of California

No. 168753

In re Petition for Naturalization of Ib Otto Astrup, Petitioner.

NOTICE OF APPEAL

Notice is hereby given that Ib Otto Astrup, petitioner above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment and order denying petitioner's petition for naturalization, entered in this action on the 15th day of November, 1968.

/s/ Paul N. Halvonik
Paul N. Halvonik
American Civil Liberties Union
503 Market Street, San Francisco
Attorney for Petitioner [R.T. 82]

Filed December 11, 1968,
James P. Welsh, Clerk.

United States Court of Appeals
For the Ninth Circuit

Ib Otto Astrup, Petitioner and Appellant, vs. Immigration & Naturalization Service, Appellee.	No. 23,859

[July 8, 1970]

On Appeal from the United States District Court for the Northern District of California

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Before: Chambers and Trask, Circuit Judges, and Plummer, District Judge.

Per curiam:

The decision and order of the district court denying citizenship to Astrup is affirmed. We believe that he is concluded by Lapenieks v. Immigration and Naturalization Service, 9 Cir., 389 F.2d 343, cert. den. 391 U.S. 951.

He made a considered decision initially to claim his alienage as a ground for avoiding military service. We believe the situation should be tested as of the time his claim was made.

Judge Plummer dissents for the reasons stated by Judge Duniway in his dissent in Lapenieks.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of San Francisco; I am over the age of eighteen years and not a party to the within action; my business address is: 562 Mission Street, San Francisco, California.

On March 4, 1971, I served the within

Appendix, "Astrup vs. Immigration and Naturalization Service, Department of Justice", in the Supreme Court of the United States; October Term, 1970, No. 840;

on the attorneys in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at San Francisco, California, addressed as follows:

Mr. Erwin N. Griswold, Solicitor General
Office of the Solicitor General
Department of Justice
Washington, D. C. 20530

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on March 4, 1971, at San Francisco, California.

M. J. Connolly